same when the occasion has arisen. In the case of In re Arkansas-Missouri Power Co., Case No. 5937, decided by the Public Service Commission May 26, 1938, and reported in 24 Missouri Public Service Commission Reports 161, the Commission ordered the Arkansas-Missouri Power Company to continue service to the town of Thayer, Missouri, pending a hearing upon the merits before such Commission. Further, in the case of Missouri, K. & T. R. Co. of Texas v. City of Whitney, 222 S. W. (2d) 1009, the Court of Civil Appeals of Texas, under authority of statutes practically identical with those in Missouri, held that the Railroad Commission of Texas had the authority to issue temporary orders as are reasonably necessary to properly perform its duties. In that case the railroad was proposing to change passenger service between two towns without having sought or obtained permission from the Railroad Commission. The court held that a district court had no jurisdiction in a temporary injunction suit to restrain the railroad from discontinuing the service pending hearing before the Railroad Commission because the Railroad Commission had exclusive jurisdiction and had authority to issue temporary orders in the matter.

These cases are in accord with the general principle of law in Missouri that the Public Service Commission, in addition to the positive powers conferred upon it by statute, is vested with all others necessary and proper to carry out fully and effectively the duties delegated to it. State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S. W. (2d) 1044; State ex rel. and to Use of Public Service Commission v. Padberg, 346 Mo. 1133, 145 S. W. (2d) 150; State ex rel. Crown Coach Co. v. Public Service Commission (Mo. App.), 185 S. W. (2d) 347.

The Missouri cases of State ex rel. United Rys. Co. of St. Louis v. Public Service Commission of Missouri, 270 Mo. 429, 192 S. W. 958; Atchison, T. & S. F. Ry. Co. v.

Public Service Commission of Missouri (Mo. S. Ct.), 192 S. W. 460, and American Petroleum Exchange v. Public Service Commission (Mo. App.), 172 S. W. (2d) 952, are not in point in the instant case. All that these cases hold is that the Public Service Commission is not a court and has no power to declare or enforce any principle of law or equity. With this statement we agree. However, an order of the Public Service Commission to a public utility, which is under its jurisdiction and to whom it has granted a franchise, is not a declaration of law or equity. An interim order to a telephone company that it should continue to render service to its customers is on no different standing than a final order to the same effect. Neither order can be enforced by the Commission, but that in no way detracts from its right to issue said orders. The enforcement of its orders lies in the courts by way of a mandamus or injunction suit brought by the Commission. Section 5683, R. S. Mo. 1939. The case of Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U. S. 673, cited by the petitioner, is not authority in the instant case. In that case the petitioner sought to enjoin the collection of taxes because of an alleged discriminatory assessment. He had not sought relief by application to the State Tax Commission because the Missouri Supreme Court in an earlier case had held that the State Tax Commission had no power in such matters. Upon appealing the injunction suit to the Supreme Court of Missouri that court held that he had not exhausted his administrative remedies by filing complaint with the State Tax Commission, which body could give the plaintiff proper relief. This court pointed out that the opinion of the Missouri Supreme Court was handed down on June 29, 1929, and that under the appropriate Missouri statutes application to the Tax Commission could not be made after October 21, 1927. This court declared that the petitioner had been denied due process because the practical effect of the Missouri court ruling was to deprive the plaintiff of his property

without him ever having had a chance not to defend against the exaction. It stated that the petitioner could not seek his remedy before the Tax Commission because that body had refused to entertain such applications, and that the Supreme Court in the earlier case had supported it in its contention. In this case it has been the settled law in Missouri since 1914 (State ex inf. Barker v. Kansas City Gas Co., 254 Mo. 515, 163 S. W. 854) that the Public Service Commission has exclusive jurisdiction over matters delegated to it by the Legislature. This view has been reiterated without deviation since that time. Therefore, the petitioner in 1947, when his telephones were removed, and in 1949, when he sought to have them reinstalled, should have known that his relief was with the Public Service Commission, and he should have sought the aid of such body. By not so doing he has not been deprived of property without due process of law.

The case of Porter v. Investors Syndicate, 286 U. S. 461, cited by the petitioner, holds that there is no deprivation of due process of law where the complaining party is provided with equitable relief or stay of execution pending a review or a correction of state administrative action. As pointed out above there was a stay of execution whether this court considers the status of the Pioneer News Service to be determined as of 1949, when it had no telephones, or of 1947, when such telephones were removed.

The second point raised in Point I of petitioner's argument is to the effect that the Pioneer News Service was denied an adequate remedy because it would have been useless and unavailing for it to make a complaint to the Public Service Commission and to seek the aid of such body because of the bias and prejudice of the Commission and because such body had already prejudged the case. The bias and prejudice is based upon the fact that the Commission had for two years, to wit, 1947 to 1949, failed, and made no attempt whatsoever, to prevent or to

stop the violation of its 1945 order. The petitioner infers that the Public Service Commission had prejudged the case because of the April 15, 1949, order which was entered ex parte and without notice to Pioneer News Service, in which order it authorized the Southwestern Bell Telephone Company to remove the telephone service of Pioneer News Service. This court, in the case of Federal Trade Commission v. Cement Institute, 333 U. S. 683, had before it the question of whether a person was denied due process because the administrative body before which he had to appear was prejudiced and biased and had prejudged the issues. The court held that the fact that a commission entertained certain views as a result of prior ex parte investigations did not necessarily mean that the minds of its members were closed. The court pointed out that in a hearing before said body the complainants could produce evidence, introduce testimony, cross-examine witnesses and bring the view of the complainant to the attention of the Commission. The situation is the same in the instant case. The order of April 15, 1949, was entered ex parte after an investigation by the Commission. The Pioneer News Service could have appeared and produced evidence and by argument presented its view to the Commission. In the Cement Institute case the court further pointed out that the Federal Trade Commission had exclusive jurisdiction in the premises and no other body had the right to act thereon. Therefore, if the entire commission were disqualified there would be no hearing or orders made. The same is true in the instant case. The court held that the bias and prejudice and prejudging on the part of the Commission did not amount to a denial of due process. Therefore, even if it were true that the Public Service Commission of Missouri was biased and prejudiced and had prejudged the Pioneer News Service case, such a condition is not an excuse for Pioneer News Service not seeking the remedy provided for by the Missouri statutes.

In view of the above it will be seen that the Pioneer News Service, Inc., had an adequate remedy at law in the premises, and it is respectfully submitted that it was not denied due process by the decision of the Supreme Court of Missouri.

IV.

The decision of the Missouri Supreme Court in this cause involved no question of deprivation of Pioneer News Service, Inc., of equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States.

The matter of primary importance to this court, insofar as Point II of petitioner's argument is concerned, is that the question presented is advanced for the first time in petitioner's petition and brief in this court. The question was never presented to the Missouri Supreme Court and was never considered by that court. The question may not now be raised for the first time in the petition for certiorari. Dewey v. City of Des Moines, 173 U. S. 193, 198.

Without regard for the lack of presentation of the question to the Missouri Supreme Court, we submit that petitioner's argument advances no substantial question of deprivation of equal protection of the laws. The crux of petitioner's contention is that, in denying the jurisdiction of the Circuit Court of the City of St. Louis to issue a temporary mandatory injunction, the Missouri Supreme Court failed to follow the Missouri statutes and prior decisions of the Missouri Supreme Court, thereby depriving Pioneer News Service, Inc., of equal protection of the laws. We submit that the argument advanced by the petitioner shows no such misapplication of Missouri law as to amount to a violation of the constitutional guarantee of equal protection of the laws.

Statutory provisions referred to by the petitioner (Sections 1661-1683, R. S. Mo. 1939) are not applicable to proceedings for temporary mandatory injunction, which was the relief sought in petitioner's court. Those statutory provisions refer only to preventative injunctions as is clear from the provisions of Section 1683, R. S. Mo. 1939, which reads as follows:

> "The remedy by writ of injunction or prohibition shall exist in all cases where a cloud would be put on the title of real estate being sold under an execution against a person, partnership or corporation having no interest in such real estate subject to execution at the time of sale, or an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages."

Clearly, petitioner's assertion that a statutory right to a temporary mandatory injunction exists in Missouri is without basis.

As for petitioner's assertion that the Missouri Supreme Court in the instant cause failed to adhere to its previous opinions involving questions similar to that here involved, "the Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions." Milwaukee Electric Railway & Light Co. v. State of Wisconsin, 252 U. S. 100, l. c. 106. Furthermore, cases relied on by the petitioner are not identical in their factual situations with that presented in the present case. The case of State ex inf. McKittrick v. American Colony Ins. Co., 336 Mo. 406, 80 S. W. (2d) 876, contains a discussion of the right to interlocutory relief pending judicial review of an action of an administrative agency. That situation is not here involved. In the present case tem-

porary mandatory relief was sought from the court without any effort at resort to the administrative remedy provided by statute. The law is well settled that, where an administrative remedy has been provided, such remedy must be pursued and refusal of the right to judicial relief in the absence of resort to such remedy is no denial of equal protection of the laws.

As for the argument based on the case of State ex rel. St. Louis-San Francisco Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2d) 340, the Missouri Supreme Court in the present case adequately explained in its opinion why its decision in such case was not controlling. The court explained the different circumstances as follows (R. 87):

> "State ex rel. Railway v. Russell, 358 Mo. 1136, 219 S. W. (2d) 340, has some similarity to the instant case, but does not sustain respondent's contention. That was an original proceeding in this court to prohibit a circuit court from exercising jurisdiction in a suit by certain employees of the railway to enjoin it from carrying out certain employment practices. We held that original jurisdiction to decide the controversy was vested in the Federal Mediation Board, but that the circuit court had jurisdiction to enjoin the discharge of the plaintiff employees until the Mediation Board could pass upon the matter or for a reasonable time to permit the jurisdiction of the Board to be invoked. There the effect of the temporary injunction was actually to preserve the status quo, that is, to prevent the employees from being discharged until the matter could be considered by the tribunal having jurisdiction. Here the injunction does not preserve the condition existing between the parties at the time of the institution of the suit, but usurps the original jurisdiction of the Commission to determine whether Pioneer News is entitled to a service which it has not had for more than two years before the suit was filed."

Such determination by the Missouri Supreme Court is no basis for any contention of denial of equal protection of the laws.

As for the argument based on the case of State ex rel. Anderson Motor Service Co. v. Public Service Commission, 234 Mo. App. 470, 134 S. W. (2d) 1069, the court, in its opinion in the present case, pointed out that the court of proper venue would have authority to review and set aside the Public Service Commission's order of April 15, 1949, if such order was not made in accordance with law. Equal protection of the laws does not require the matter to be decided when not presented in accordance with statutes fixing venue.

There is nothing in the decision of the Missouri Supreme Court which in any way conflicts with the decision of this court in the case of Truax v. Corrigan, 257 U. S. 312, which is relied upon by the petitioner. That case involved a statute which prohibited the granting of injunctions in labor disputes involving secondary boycotts. This court held that denial of injunctive relief in that class of cases was a denial of the equal protection of the laws. Here, however, there is involved no statute prohibiting the granting of injunctive relief. The Supreme Court of Missouri has merely held that such relief should not be granted when jurisdiction of the subject matter of the dispute has been conferred upon an administrative body. There is no denial of relief, and all parties similarly situated are afforded the same procedure.

Therefore, even had the question of denial of equal protection of the laws been raised in the Missouri Supreme Court, as it was not, it is submitted that the arguments advanced by the petitioner demonstrate no violation by the Missouri Supreme Court in its opinion of the rights protected by such provision of the Constitution of the United States.

V.

The decision of the Supreme Court of Missouri does not have the effect of sanctioning the removal of telephone service upon receipt of notification from a law enforcement officer that such service is being used as an instrumentality to violate the law, but even should such effect be accorded the opinion, it would not involve the abrogation of any constitutional rights of Pioneer News Service, Inc.

Respondent must disagree with petitioner's statement in his brief (Petitioner's brief, page 45) that the matter of the validity under the Federal Constitution of the action of the Southwestern Bell Telephone Company in removing the telephone service upon receipt of notification from the Governor and Attorney General of Missouri that the service was being used as an instrumentality to violate the law was argued at length in the Missouri Supreme Court. In his return to the preliminary writ in prohibition (R. 67), this question was not raised. The question was not even raised in petitioner's motion for rehearing before the Missouri Supreme Court (R. 89), in which petitioner presented the only questions under the Federal Constitution which were presented to the Missouri Supreme Court. Thus, it is submitted that this is again a question which was never presented to the Missouri Supreme Court in the proceedings before it.

Point III of petitioner's argument furthermore assumes an entirely unwarranted view of the effect of the decision of the Missouri Supreme Court. Petitioner states that the Supreme Court of Missouri ruled in this case that the removal of telephone service by a telephone company upon receipt of notification from a law enforcement officer that such service is being used as an instrumentality to violate the law does not render such discontinuance unlawful.

As we have previously stated, no such question was presented to the Missouri Supreme Court and no such effect can be given to the decision of that court.

Again we must point out that the only question presented to and decided by the Supreme Court was that of jurisdiction of the Circuit Court of the City of St. Louis. The question of the legality of the action of the telephone company in discontinuing service was not involved in the decision on that question. Actually, the Missouri Supreme Court in its opinion expressed doubt about the legal justification of the action of the telephone company. The Missouri court referred to the case of Andrews v. Telephone Company, 83 Fed. Supp. 966, cited by petitioner in his brief in this court. Referring to that case the Missouri Supreme Court said (R. 88):

> "We agree with much that is said in that opinion, but we do not regard it as complete authority for respondent's (petitioner's) position in the instant case." (Word in parenthesis ours.)

The Missouri court in its opinion further stated (R. 89):

> "In the instant case the notice from the governor and attorney general did not amount to a judicial finding of the facts stated therein and did not constitute full and complete authority for the telephone company to discontinue service. But, coming from the chief law enforcement officers of the State, it was not to be ignored or lightly considered. No doubt the telephone company could have applied to the Commission for permission to discontinue service. Apparently it was satisfied that the statements contained in the telegram were true and assumed the responsibility of discontinuing service. The **initial** jurisdiction to determine whether the action of the telephone com-

pany is legally justified is vested in the Public Service Commission and not in the courts."

The last sentence above quoted clearly shows what the Missouri Supreme Court decided in the instant cause. Any attempt on the part of petitioner to construe the holding of the court as sanctioning removal of telephone service without granting the subscriber adequate protection is completely unjustified. Certainly the decision of the Missouri Supreme Court does not, as stated by the petitioner, permit the removal of telephone service without relief being afforded by any state administrative or judicial body. The Missouri Supreme Court in its opinion clearly pointed out the administrative body authorized to grant relief, the Missouri Public Service Commission.

Even should the effect of the decision of the Missouri Supreme Court be such as that asserted by petitioner, Pioneer News Service, has not been deprived of any rights protected by the Constitution of the United States. Telephone service is not such a right as is protected by the due process clause of the Fourteenth Amendment. The so-called right to service by a public utility exists solely by reason of the state's exercise of its police power in the regulation of public utilities. Obtaining service from a public utility is not such a vested right as falls within the property protected by the due process clause of the Fourteenth Amendment. United States Light and Heat Corporation v. Niagara Falls Gas and Electric Light Company, 47 Fed. (2d) 567, 570.

Furthermore, a public utility may adopt reasonable regulations regarding its service. A public utility is not required to render service when it has reason to believe that the service is being used for unlawful purposes. Fogarty v. Southern Bell Telephone and Telegraph Company, 34 Fed. Supp. 251; Hamilton v. Western Union

Telegraph Company, 34 Fed. Supp. 928; Tracy v. Southern Bell Telephone and Telegraph Company, 37 Fed. Supp. 829; Shillitani v. Valentine, 296 N. Y. 161, 71 N. E. (2d) 450.

The tariff regulation under which Southwestern Bell Telephone Company acted in this case authorised discontinuance of service upon receipt of notice from a law enforcement officer that the service was being used to violate the law. No obligatory discontinuance was called for by the regulation. Even in the absence of such regulation, Southwestern Bell Telephone Company had the right to discontinue service to a customer who used such service as an instrumentality to violate the law. Hamilton v. Western Union Telegraph Company, 34 Fed. Supp. 928. The telephone company in the present case had been notified that the service which it was rendering to Pioneer News Service was being used in violation of a specific provision of the criminal laws of Missouri, to-wit, Section 4674, R. S. Mo. 1939, relating to bookmaking. Rather than assume the risk of prosecution for aiding and abetting the criminal violation after having been placed on notice of it, the telephone company saw fit to take advantage of the provision of the tariff authorizing discontinuance. Pioneer News Service, of course, was receiving telephone service subject to the conditions of the tariff regulations, and we submit that the action of the telephone company did not deprive Pioneer News Service of any property right without due process of law. Certainly Pioneer News Service has no right to conduct its business in such a manner as to subject another to criminal liability by reason of service furnished to it.

The guarantees of the Fourteenth Amendment extend only to the conduct of a lawful business. Murphy v. People of the State of California, 225 U. S. 623. According to the information submitted by the Governor and

Attorney General to the Southwestern Bell Telephone Company, which information has subsequently been verified on numerous occasions, including investigations by committees of the United States Senate, Pioneer News Service was not engaged in a lawful business and, therefore, is in no position to invoke the protection of the Fourteenth Amendment.

When the Southwestern Bell Telephone Company saw fit to invoke its tariff regulation, Pioneer News Service was not left remediless, as petitioner now asserts. The remedy pointed out to Pioneer News Service by the Missouri Supreme Court in the present case was available at the time of the discontinuance of the service. Petitioner in his original order in the cause before him recognized the existence of such remedy before the Public Service Commission. This was not a remedy which had previously been denied, such as was involved in the case of Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U. S. 673, and which was suddenly uncovered by the Supreme Court's decision but was no longer available by reason of the lapse of time. The remedy had existed at all times. The Missouri Public Service Commission in its preliminary report and order of April 15, 1949, pointed out that its doors had been open at all times following the discontinuance of service, but Pioneer News Service had not seen fit to make any complaint to that body (R. 32). The order also kept the door open for any application which Pioneer News Service might see fit to make to obtain the restoration of its telephone service. Merely because Pioneer News Service did not see fit to follow the remedy available does not cause the procedure to be lacking in the essentials of due process of law.

VI.

The decision of the Supreme Court of Missouri did not pass upon the validity of the order of the Public Service Commission of Missouri, dated April 15, 1949, as it was not involved in the determination of the cause before it, but the Missouri Supreme Court did point out the method by which Pioneer News Service, Inc., might have obtained relief from such order, if invalid.

The petitioner, in Point IV of his argument, states that he has been deprived of due process of law because of the April 15, 1949, order of the Public Service Commission. This order was entered after an investigation by the Public Service Commission, and was ex parte. It authorized the telephone company to discontinue its service to Pioneer News Service. The order was entered after the petitioner had entered his judgment granting a temporary mandatory injunction to Pioneer News Service on April 12, 1949. No notice was given to Pioneer News Service before this order was entered, nor was any hearing had thereon. The order took effect at once. The reason advanced by the petitioner that such order violated due process was because of the lack of notice of hearing, and also because no appeal from such order was available. What was succinctly said by the court below in regard to this order we believe is especially applicable. The court said:

> "But, respondent says the later order of the Commission was made without notice or hearing and is void. We need not decide that question. Pioneer News appearing specially, unsuccessfully, asked the Commission to revoke that order. Under the statutes it could have obtained a speedy review by the circuit court of Cole County."

As the court pointed out, it did not pass upon this question because there was no need therefor. The effect of an

extraneous order of the Public Service Commission is not in issue in a cause to determine the jurisdiction of a circuit court.

However, it will be noted that the court below held that Pioneer News Service "could have obtained a speedy review by the circuit court of Cole County." This is a statement by the Missouri Supreme Court as to procedural remedy afforded a litigant under a Missouri statute, and, as such, is accepted as conclusive by this court. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740. Therefore, the Pioneer News Service, if it thought such order was illegal and void, had an adequate remedy by appeal.

There is a further reason why this order does not deprive the Pioneer News Service of its property without due process. As has been stated before in this brief, the Public Service Commission Act provides a complete and adequate remedy and affords due process to a person seeking recourse to said Commission. It has long been the rule of this court, since Arrowsmith v. Harmoning, 118 U. S. 194, that where the statutes of the state provide due process the fact that a court, acting within its jurisdiction, makes an erroneous decision does not deprive a person of life, liberty or property without due process of law. Granting for the sake of this brief that the order of the Public Service Commission was erroneous and void, still that does not render unconstitutional the statutes under which it acted, and such matters could have been corrected on appeal by the one affected, to-wit, Pioneer News Service, Inc.

CONCLUSION.

Respondent respectfully urges that there is no reason for review by this court of this cause on certiorari. The Missouri Supreme Court has passed upon no federal question whatsoever. The decision of that court was on a

matter of purely local law and was based entirely on local law without consideration of any federal questions. Petitioner, in his motion for rehearing in the Missouri Supreme Court, sought to interject constitutional questions, but such questions were in no manner essential to the determination of the cause in the Missouri Supreme Court. He has sought to raise further matters in his petition and brief in this court, but such matters were likewise not presented to the Missouri Supreme Court and their consideration was not essential to the decision by that court.

The Missouri Supreme Court has pointed out the course which Pioneer News Service must follow under Missouri law for determination of its asserted right to obtain restoration of telephone service. In following such procedure Pioneer News Service may raise and have adjudicated any constitutional objections which it believes such procedure presents. Furthermore, upon such action all essential facts relating to Pioneer News Service's right to telephone service may be established. To attempt to determine such right in a cause involving only a narrow jurisdictional question is obviously impracticable.

The people of the State of Missouri have a great interest in having this matter determined on its merits. The Governor and the Attorney General of Missouri have charged that Pioneer News Service is using telephone service as an instrumentality to violate the laws of the State of Missouri. Service was discontinued at their request, and for more than two years Pioneer News Service made no attempt whatsoever to establish its right to telephone service. By virtue of an order of petitioner, which the Missouri Supreme Court has held he lacked jurisdiction to issue, Pioneer News Service has regained and has had the use of telephone service since April, 1949.

In a hearing upon the merits of Pioneer News Service's claim, all important matters may be brought forth, and

we submit that this court, in view of the fact that there is no essential federal question involved in the present cause, should not now attempt to determine what rights Pioneer News Service might have under the Constitution of the United States and laws of the State of Missouri.

Therefore, we respectfully submit that the petition for certiorari in this cause should be denied.

Respectfully submitted,

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